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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 13.

UNITED GAS PUBLIC SERVICE COMPANY, *Appellant*,

v.

STATE OF TEXAS, ET AL.

Appeal From the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

PETITION OF APPELLANT FOR REHEARING.

JOHN P. BULLINGTON,
F. G. COATES,
Counsel for Appellant.

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PETITION OF APPELLANT FOR REHEARING.

Pursuant to Rule 33 of this Honorable Court, United Gas Public Service Company, appellant herein, presents this, its petition for a rehearing of this cause, limited to that portion of the Court's opinion and judgment affirming the judgment of the State court sustaining the validity of that portion of the Commission's order which made its rate retroactive to January 1, 1932. In support thereof appellant respectfully shows:

I.

Validity of Retroactive Provision.

The Commission's order fixing the 55 cent rate was dated June 13, 1933, but was made retroactive to January 1, 1932 (R. 26). The trial court held the retroactive provision in-

valid, but did not state the ground for the holding (R. 391). The State appellate court upheld the provision and reformed the judgment below so as to enforce it (R. 428), and error in this respect was duly assigned in this Court (R. 512). In the order requiring reargument here, there was noted the Court's desire to hear the parties as to the effect on appellant's rights, with respect to the calendar years 1932 and 1933, of the bond given by appellant on its appeal to the Commission from the City's ordinance. Preliminary Print, 302 U. S. vi. In the opinion of February 14, 1938, it was said:

> "Third.—With respect to the question of the validity of that part of the Commission's order which made its rate retroactive to January 1, 1932, considered in the light of the evidence relating to the intervening period and of the bond given on the appeal to the Commission from the City's ordinance, this Court is equally divided and the judgment of the Court of Civil Appeals in that relation is accordingly affirmed."

The Question as to the Bond is of Public Importance.

The amount of money controlled by the validity of the retroactive provision is substantial, though not large when compared with the total financial consequences to appellant of the Court's judgment. But the legal effect of a bond in the form given the Commission here is vitally important, not only to appellant, but to all public utilities and other businesses and their shareholders taking appeals to administrative boards or commissions in which bonds of similar import may be required.

Appellant furnishes natural gas in 115 cities and towns in Texas (R. 346), which is primarily significant, not on account of the scope of the operations, but because a property of this character provides the only feasible means by which the benefits of natural gas, which is produced only in localized areas, can be broadly distributed. Each such incorporated municipality, acting separately and indepen-

dently of all other municipalities or State agencies, has the power to fix by ordinance, and without either notice or hearing, the gas rates to be charged within its corporate boundaries.[1] Whenever rates fixed by such an ordinance are thought by appellant to be confiscatory, it has only one remedy, *which is an appeal to the Railroad Commission of Texas.*[2] Such appeal can be taken only by filing with the Commission "on such terms and conditions as the Commission may direct, a petition and bond to review the . . . ordinance . . . " Art. 6058.

The bond in issue here is the same in its terms and conditions as the Commission has required on every gas rate appeal since 1931. Cf. *Harris* v. *Municipal Gas Co.,* (1933), not officially reported, 59 S. W. (2d) 355. If the bond tendered is not on the Commission's prescribed form and in an amount fixed or concurred in by a majority of the Commissioners, that body will not take the appeal and supersede the rate reduction ordinance.

Allowance of the appeal and suspension of the ordinance enable the Commission to retain jurisdiction and forestall court action until entry of its final order. See *Harris* v. *Municipal Gas Co., supra;* cf. *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290. While Article 6058 provides that the Commission shall determine "any such appeal within sixty days after the filing," this is not done, as the Commission, following the opinion of the State Attorney General, construes this provision as merely directory.[3] This appeal was before the Commission over ten months before the hearing ended, and the Commission did not enter its order till seven months after the hearing was closed (R. 9,

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[1] Article 1119, R. C. S. of Tex., 1925, as amended by Acts, 45th Texas Legislature, H. B. No. 131, sec. 1.

[2] Art. 6058 R. C. S. of Tex., 1925, quoted in footnote 1 of the Court's opinion entered February 14, 1938.

[3] The delay is not solely due to the Commission. Often it is the gas company, and more often the municipality, which is not ready to complete its testimony so as to allow determination in sixty days.

26). Thus suspension of the ordinance is essential to prevent imposition of a confiscatory rate for a considerable period of time.

The third portion of the Court's opinion has raised a grave doubt as to the effect of all such bonds which will continue until this Court definitely settles the question. This state of uncertainty will not be confined to Texas, where the Commission's standard form bond is conditioned as the bond here, as follows:

> "The condition of this obligation is, that the said principal and surety shall refund and pay to the City of Laredo for the benefit of the consumers in said City any excess of rates or charges collected by the principal, Texas Border Gas Company, over and above the rates and charges that shall be finally determined to be a fair and reasonable return upon the value of its property used and useful in supplying natural gas and natural gas service to the City of Laredo, Texas; otherwise, this obligation shall be null, void and of no further force or effect." (R. 59-60)

In Ohio, the condition of the bond executed by the Ohio Bell Telephone Company was:

> "Now, Therefore, if the said utility shall well and truly repay to each and every consumer, at such times and in such amounts as *the Commission shall order*, such portion of the increased rate . . . collected by said utility *as the Commission, on final hearing, may determine* to have been unreasonable or excessive, then this obligation shall be void, otherwise to remain in full force and effect."

See volume I, p. 66 of the printed record in *Ohio Bell Tel. Co.* v. *Pub. Util. Comm. of Ohio,* No. 539, October Term, 1936, wherein the Commission's order was set aside without mentioning the bond. 301 U. S. 292. The Ohio bond, providing for repayment, at such times and in such amounts as the *Commission* shall order, of such portion of collections as the *Commission* shall find excessive or unreason-

able, is obviously much more onerous and contractual in form than the Texas bond as to which the Court has left this question in doubt.

As the matter now stands, appellant cannot know what to do and still be secure in its right to avoid confiscatory rates during pendency of an appeal to the Commission. It might tender the Commission a bond in which the right to contest any confiscatory rate ordered as a result of the appeal was spelled out in more elaborate detail, and still not be secure. For appellant has believed the obligation to refund only the portion of collections "over and above the rates and charges *finally determined* to be (yield) a fair and reasonable return" (R. 59-60)[4] was a clear reservation of the unrestricted right to challenge the order on every available ground, and that the obligation to refund only on *final determination* would be construed in the light of the State and Federal statutes providing for judicial inquiry into the validity of a proposed rate order, and for *successive appeals from such judgment.* If this Court should hold that the evidence showing the application of the order from January 1, 1932 to the date of the order or trial proved the order confiscatory for such period, no rational person could assert that the 55 cent rate had been "finally determined" to yield "a reasonable return" on property value during that period.

If, in the future, the Commission should refuse to take an appeal without execution of the present bond, appellant would be compelled to obey the ordinance or test the Commission's demand for such a bond by injunction or mandamus. In any such suit, appellant would have to rely solely on the Third Portion of the Court's opinion, which, being by an equally divided Court, is inherently inconclusive. Appellees have cited no cases in support of their

[4] Word in parenthesis ours. Counsel recalls that the more recent bonds substitute "yield" for "be," the only purpose of the change being to make the language more apt, not to change the meaning.

position as to the effect of this bond, and appellant has found none.

Appellant respectfully submits that the Third Portion of the Court's opinion and judgment is erroneous, because:

1. A *valid* consent by appellant to surrender its constitutional right to just compensation cannot be exacted by the Commission as the price for suspension and review of a rate ordinance claimed to be confiscatory. Cf. *United States* v. *Chicago, Milwaukee, etc., R. Co.*, 282 U. S. 311, 328-329. This record shows that the ordinance fixing the 40 cent rate, for suspension or review of which said consent is claimed to have been given, was set aside by the Commission as unjust and unreasonable (R. 427), and hence the alleged consent was the price for entertaining a *justified* appeal from an *invalid* ordinance.

2. As a condition for performing its statutory duty to review an ordinance and for the exercise of its discretion as to suspension thereof, the Commission cannot compel appellant to relinquish all or any part of its right to an *adequate judicial review* of the Commission's action. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418, 459-460; *Chesapeake & Ohio Ry. Co.* v. *Conley*, 230 U. S. 513, 521-522. The Railroad Commission has the abstract power to make any rate it fixes effective as of the time appeal to it was taken (R. 427-428). Any order which, in respect to the period extending from the time of filing to the time of deciding the appeal, would leave appellant less than just compensation for the use of its property during said period, would be repugnant to the Constitution.[5] *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349,

[5] Proof of experience brought forward from the time of closing the Commission record as nearly as possible to the time of trial is deemed particularly persuasive in a confiscation case. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 15. To require such proof, but to permit an administrative body to exact from those compelled to invoke its action an agreement not to claim the rights established thereby, would seem incongruous.

373. Both the alleged condition and consent were unconstitutional.

3. The alleged consent, being in derogation of constitutional rights, will not be found unless it *unmistakably* appears. The bond itself is not in evidence, appearing in the record only in the bill of exception to its exclusion (R. 59-60). Hence there was no occasion at the trial for evidence as to whether the bond was voluntarily executed or exacted by coercion. Every inference is against appellant's voluntary and intentional surrender of any right to attack the Commission's order. The Court judicially knows it to be contrary to human nature for men to willingly undertake use of their property for less than a reasonable return. *Dayton Power & Light Co.* v. *Pub. Util. Comm. of Ohio*, 292 U. S. 290, 311-312. There is no proof that the Commission's review or suspension of an ordinance is so valuable a right as to justify that sacrifice. When the Commission will not do its duty, the courts are open.

4. The Commission has statutory power to make its rate effective and order refunds from the time of filing the appeal (R. 427-428). In these respects, the bond adds nothing to power the Commission already possesses. The only purpose of the bond is to more adequately secure the payment of refunds. A contrary conclusion attributes to the Commission an intent to make an exaction which the Constitution forbids.

5. At the most, the bond is ambiguous, requiring evidence of the surrounding circumstances to explain the intent. Such evidence was not introduced at the trial, because the *bond* was not in *evidence* to explain. Certainly the petition tendering the bond and the order of suspension would be a substantial aid to proper construction. Any ambiguity in a document not in evidence, wholly disassociated from its related documents, would prevent that document from being taken as a definition of constitutional rights.

Confiscatory Operation of the Retroactive Provision.

To avoid repetition, appellant makes reference to pp. 47-50 of its main brief and pp. 15, *et seq.* of its supplemental brief on reargument, noting respectfully its urgent need for definite determination as to whether the testimony on which appellees attempt to support elimination of all general expense for 1933 rises to the dignity of evidence, as the claim information was withheld is now conclusively refuted, and such testimony limited to that of appellees' accounting witness who, after availing himself of the free run of appellant's books for nine months, said his time was too short and the general expense accounts too voluminous for him to audit each item (R. 724-725; 793-794).

II.

Request for Amendment of Opinion.

On pages 13 and 14 of its opinion, the Court, speaking from the printed record, says that appellant submitted and requested only certain special issues that did not embrace all the questions the jury should consider, and that appellant failed to request amplified instructions which might have aided the jury. These passages are quoted in footnote 6 below. Since the original record, which shows all the issues

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[6] From the Court's opinion of February 14, 1938:

p. 13.

"It will be observed that these special issues did not embrace all the questions which the jury should consider, as for example, the question of operating revenues, operating expenses and return."

p. 14.

"Appellant, while objecting to the charge on grounds which are not impressive, did not submit and request amplified instructions which might have aided the jury's consideration. Appellant was apparently content to object to the pertinent instructions that were given, and to a general charge, and to stand on its limited requests as to special issues.

Upon such a record we are unable to hold that there was a denial of federal right so far as procedural due process is concerned."

requested by appellant, is on file in this Court, since these passages might innocently lead those relying on the opinion into error and might suggest that appellant's counsel prejudiced the client's rights in the trial court, appellant respectfully requests amendment of the opinion to conform to the facts as shown by the original record, and in support thereof, shows:

The trial court's charge, when submitted to counsel, had features both of a general charge and a submission on special issues (R. 380-382), these being mutually exclusive methods under the State law.[7] Appellant used the only means available to it to make the record show which method the court had elected,[8] and the court ruled that "the charge submitted is on Special issue." See Order on page 372 of the printed record. In reliance on this ruling, appellant submitted and requested and court refused the special issues summarized in footnote 9 below. The State forbids sub-

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[7] Appellant's main brief, pp. 84-85, Articles 2185, 2189 and 2202.

[8] Absent request by either party, the trial court may elect either form of submission. A party has only one election, *i. e.*, a request for submission on special issues. See Art. 2189, quoted appellant's main brief, p. 85, and appellant's motion (R. 372).

[9] The issues are shown in the Transcript of the original record in the State court, pp. 116-202, numbered as set out below. The jury was instructed in each instance not to answer a later issue of the series if it had answered a prior issue with which there might be conflict. A summary of the requested issues is:

1. Was the fair value of the property used and useful to serve Laredo $1,225,000 in 1932 (Tr. 116).
2. Was said value $1,225,000 in 1933 (Tr. 118).
3. Was said value $885,000 in 1932 (Tr. 120).
4. Was said value $885,000 in 1933 (Tr. 122).
5. Did the figure $885,000 include allowance for materials and supplies, working capital and general overheads (Tr. 124).
6. 7. 8. Same questions as No. 5 above (Tr. 126, 128, 130).
9. Definition of used and useful property (Tr. 132).
10. What was the fair value of the used and useful physical operating properties in 1933 (Tr. 134, R. 373).

11. What was the fair value of the Jennings-Pescadito transmission line in 1933 (Tr. 136).

12. What was the fair value of the used and useful physical operating properties in 1932 (Tr. 138, R. 374).

13. What was the fair value of the Jennings-Pescadito transmission line in 1932 (Tr. 140).

14. What was the amount of materials and supplies, stated in dollars, required for the service of Laredo during 1933 (Tr. 142, R. 374).

15. 16. Definition of working capital. What cash working capital was required in 1932; in 1933 (Tr. 144, 146, R. 375, 376).

17. 18. Definition of going value. What was the going value inhering in the properties and business in 1932; in 1933 (Tr. 148, 150, R. 376, 377).

19. What was the overall average cost of the gas purchased at well-head by company from independent well-owners for use in Laredo during 1933 (Tr. 152, R. 377).

20. 21. 22. Is the proper annual depreciation allowance 5 per cent for the distribution properties, 6 per cent for the transmission properties, and 10 per cent for gathering properties serving Laredo (Tr. 154, 156, 158).

23. Definition of annual depreciation rate or reserve accrual (Tr. 160).

24. Is 3 per cent of $885,000 the fair depreciation allowance for the gas properties serving Laredo (Tr. 162, R. 378).

25. 26. 27. What amount, stated as a per cent of the reproduction cost of depreciable items, is a fair depreciation allowance therefor, and what is such cost (Tr. 164, 166, 168, R. 378).

28. 29. Same questions as to depreciation allowance and base for transmission properties (Tr. 170, 172, R. 379).

30. 31. Same questions as to depreciation allowance and base for gathering properties (Tr. 174, 176, R. 379).

32. 33. What was a reasonable rate of net annual return to company from Laredo operations in 1932; in 1933 (Tr. 178, 180).

34. 35. What per cent of fair property value would have been a reasonable return for Laredo operations in 1932; in 1933 (Tr. 182, 184).

36. What was the proper basis for apportioning joint transmission operations and maintenance expense between the Jennings-Roma and the Laredo transmission lines (Tr. 186).

37-44. During 1933, what was the cost of operating the properties serving Laredo for transmission operations (Tr. 188), transmission maintenance (Tr. 190), distribution operations (Tr. 192), distribution maintenance (Tr. 194), customers' expense (Tr. 196), new business expense (Tr. 198), law expense (Tr. 200) and necessary donations (Tr. 202).

mission of questions of law in a charge on special issues,[10] and the Supreme Court of Texas holds that the reasonableness of an act legislative in character is a *question of law*, and when determination of that question depends on the facts and arises in a jury trial, only the *facts* are to be resolved by the jury. *Houston & Texas Central Ry. Co.* v. *Dallas* (1905) 98 Tex. 396, 417; *Missouri, Kansas & Texas Ry. Co.* v. *Improvement District* (1927) 117 Tex. 34, 50.

The theory of the case on which appellant diminished the record for printing was that this Court would give to the jury's verdict the *character* attributed to it by decisions of the highest Court of the State, *i. e.*, a petit jury's answer to a question of law, or else, if the Court found that the evidence was sufficient to require resolution of the conflicting testimony on the facts conditioning the constitutionality of the Commission's order, the Court would note on the face of the record that whether the issues of fact had actually been determined in the trial court was raised,[11] but neither decided by nor necessary to the final judgment[12] from which the appeal here was taken, requiring the case to be sent back for decision of that question. Hence the printed record was made to include only enough of the special issues requested to show that appellant had sought, and had not waived, determination of the alleged inadequacy of the rate base and depreciation allowance on which the Commission estimated the 55 cent rate. Finally, appellant submits that the passages in question, written from the viewpoint of the procedure a State has power to provide, suggest omissions

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[10] See Article 2185, quoted appellant's main brief, p. 85, providing for submission only of "controverted questions of fact."

[11] Assignment 14 in the Court of Civil Appeals (R. 407).

[12] See the opinion of the Court of Civil Appeals (R. 414). Denial of writ of error by the Supreme Court of Texas signified that further review was refused because the judgment of the Court of Civil Appeals was deemed correct both in result and the rules of law applied. Article 1728, quoted on pp. 43-44 of appellees motion to dismiss this appeal.

on the part of counsel in respect to acts which, under the particular procedure, were not permissible, and therefore may reflect on counsel unfairly. See *McFaddin v. Hebert* (1929) 118 Tex. 314, 322-323.

CONCLUSION.

It is respectfully urged that the correction in the Court's opinion above referred to should be made; that a rehearing should be granted, limited to the point denominated "Third" on page 17 of the Court's opinion, and that upon such rehearing the judgment of the Court of Civil Appeals upholding the retroactive provision of the Commission's order should be reversed.

JOHN P. BULLINGTON,
F. G. COATES,
Counsel for Appellant.

CERTIFICATE OF COUNSEL.

I, F. G. Coates, counsel for appellant United Gas Public Service Company in the above cause, do hereby certify that the foregoing petition for a rehearing thereof is presented in good faith and not for delay.

F. G. COATES,
Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

NO. 13

UNITED GAS PUBLIC SERVICE COMPANY,
Appellant

Versus

THE STATE OF TEXAS, ET AL,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

REPLY TO APPELLANT'S PETITION FOR REHEARING

By confining its Petition for Rehearing to that portion of this Court's judgment upholding the judgment of the highest state courts requiring refunds from and after January 1, 1932, Appellant impliedly confesses that this Court's decree upholding the reduced rate in its prospective operation is just and correct. The main idea now entertained by Appellant seems to be to salvage something—no matter how little—out of the case. The necessary implication from this implied admission is that the 55c rate set by the Commission is, *in its average operation, prospectively,* non-confiscatory.

If the 55c rate, in its *average operation* over a reasonable period of years, be non-confiscatory, as Appel-

lant has impliedly confessed it to be, then an inescapable corrollary is that the 55c rate in its *average operation* over a reasonable period of years from and after January 1, 1932, must likewise necessarily be non-confiscatory. Appellant's contention is only that for the doubly subnormal years 1932 and 1933, considered alone and apart from other normal or better years, the rate is confiscatory. What Appellant really should say is, that the yields for those years are *below the average*. And the average yield under the 55c rate not only has not been proved by clear and convincing evidence to be confiscatory but has been shown to be both above the line of confiscation and above the line of reasonableness.

This Court judicially knows that, due to many varying conditions such as temperature fluctuations, and fluctuations of operating revenue from varying economic conditions, and due to the varying exigencies of operating expense, the net revenues of any public utility, more especially those of a natural gas utility, must necessarily fluctuate widely from year to year; and the only fair, equitable and reasonable basis upon which to compute the actual return, or the fair return, being enjoyed by such a natural gas utility is necessarily an average over a reasonable spread of years.

This Court has many times approved the adoption of an average rate of return over a reasonable spread of years as a test for the exercise of *prophecy* by the rate-fixing body and by reviewing courts.

The only question which Appellant now raises is whether or not the Court should apply a like test over

a spread of years including two subnormal years of actual experience—such actual experience not being under the 55c rate but under the prevailing 75c rate, voluntarily fixed by the utility in the first instance, and by its action continued in existence during the period in which the reduced rate *should have been* in actual operation for a reasonable trial or test period, but during which its operation has been superseded and suspended by the voluntary and self-serving action of the utility itself, adopted of its own will and volition, and during a period for which the City and the Commission and the consuming public had no means by which they could constitutionally suspend the operation of the 75c rate which the utility has chosen to defend as being the minimum rate constitutionally valid, and legally just and reasonable, both before the legislative bodies and the judicial tribunals of the land.

Thus, it becomes very plain that what the Appellant is asking this Court to do is, not simply to give to the Fourteenth Federal Amendment such an interpretation as will permit the utility to earn only a *non-confiscatory rate of return*, but such an interpretation as will permit it, the utility, to earn an average rate of return, year in and year out, *very substantially above a non-confiscatory average rate of return.*

This position becomes increasingly plain when we point out that what the Appellant is contending for is a holding by this Court that the net rate of return *must never be permitted, even for a single twelve months' operating period*, to fall below *what it contends* is the line of confiscation.

Stated in plainer terms, this is a contention that the utility must be permitted *always to take advantage of all of the fluctuations of net revenue from year to year above the average*, but that the Fourteenth Federal Amendment inhibits the imposition upon the Company of the correlative duty of accepting also *the fluctuations of net revenue from year to year below the average.*

If such a rule were adopted by this Honorable Court, the inevitable net result of it in average operation over a period of years would be, not that the Federal Fourteenth Amendment guarantees to the utility merely a non-confiscatory rate of return, but that it insures to the utility an *average* rate of return far above the line of confiscation, and even above the line of reasonableness.

Stripped of all fancy verbiage and sophistry, the Company's contention is simply that, because under its *interpretation* of the evidence its net rate of return may have fallen, for 1932 and 1933, something below the *average* net rate of return of 7 per cent aimed at by the Commission as reasonable, that the reduced rate has necessarily been *confiscatory*, within the meaning of the Fourteenth Federal Amendment, during the years 1932 and 1933.

The plain truth is that because of abnormalities of temperatures and of economic conditions, and because of the deliberately adopted policy of the Company of alienating its industrial consumers in Laredo by gross discriminations as between Laredo, Nuevo Laredo and other points in Mexico, and because of the uncon-

scionably inflated rate base and depreciation requirements and operating expense accounts and rate of return claimed by the Company before the legislative and judicial bodies, the net rate of return enjoyed by the Company—not under the reduced rate, but under its old rates—has for 1932 and 1933 only fallen *below the average*—and it is inevitable that in the years subsequent to 1933 these deficiencies of net revenue, if indeed they be deficiencies at all, will be adequately compensated for by the fluctuations of net revenue, *above the average*, certain to occur.

Appellant, in its Petition for Rehearing (p. 3) mentions a purported opinion of the Attorney General of Texas which, it is said, holds that the provisions of Article 6058, R. C. S. Tex. 1925, requiring the Commission to dispose of the Company's appeal within 60 days after its lodgment, are merely directory and not mandatory. Counsel do not give the date of any such opinion nor quote the language of same, verbatim or in substance, and we do not even know of the existence of such an opinion.

Moreover, this Court is not required to take judicial notice of, or to be bound by, opinions of the Attorney General of Texas, and certainly no such opinion is in evidence in the record.

When we look at the terms of Article 6058, alone, we see that the Commission is required to dispose of each appeal within 60 days after its perfection, *unless the complaining utility consents in writing* that its pendency may longer be continued. Appellant does not show, however, that such delay was not acquiesced in by its own written consent in accordance with the